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Issue Date: 12 February 2003

CASE NO.: 2002-LHC-1118

OWCP NO.: 07-013660

IN THE MATTER OF

ARTHUR L. TRUITT
Claimant

v.

AVONDALE INDUSTRIES, INC.
Employer

APPEARANCES:

William S. Vincent, Jr., Esq.
For Claimant

Richard Vale, Esq.
For Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Arthur L. Truitt (Claimant) against self-insured Avondale Industries, Inc. (Employer). The formal hearing was conducted at Metairie, Louisiana on October 8, 2002. Each party was represented by counsel, and each presented documentary evidence, examined and

cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-11 and Employer's Exhibits 1-21. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on October 5, 1995;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on October 5, 1995;
5. Notices of Controversion were filed October 2, 1997 and September 22, 1999;
6. An informal conference was held on August 18, 1999;
7. The average weekly wage at the time of injury is disputed;
8. Employer paid Claimant benefits including temporary total disability from October 6, 1995 to September 24, 1997 and October 9, 1997 to December 6, 2001 at $277.75 per week, for a total of $101,409.03;
9. Medical benefits have been paid;
10. Claimant is permanently disabled, with a 93% impairment to either the hand or arm; and
11. Date of maximum medical improvement for Claimant's hand or arm injury was September 25, 1997.

Issues

The unresolved issues in this proceeding are:

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[1]The parties were granted time post hearing to file briefs. This time was extended up to and through January 3, 2003.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

1. Nature and Extent of Claimant's disability, Claimant's ability to work;
2. Whether Claimant is entitled to additional benefits besides the scheduled disability, and method of awarding scheduled and unscheduled benefits;
3. Relationship of psychiatric problems to the accident;
4. Average Weekly Wage.

Statement of the Evidence

Testimonial and Non-Medical Evidence

Claimant, 43 years old at the time of the formal hearing, has an eighth grade education. He is married with 3 children, ages 9, 20, and 21. Claimant was employed as a paint sandblaster with Employer for the 9 years preceding his accident, and was earning $10.85 per hour. On October 5, 1995, while Claimant was trying to remove the clogged head of a paint gun, pressure was released and shot paint through his glove into his left thumb. Shortly thereafter, on the recommendations of family members, Claimant went to see Dr. Stuart Phillips, an orthopedic doctor, who became his treating physician. Eventually, Claimant had his thumb amputated, but even after the amputation he had complications from residual traces of paint. Claimant explained that his thumb never fully improved, and continued to worsen, to the point where he experienced pain shooting the length of his arm. He testified that the terrible pain in his arm is made worse by cold weather, causing his whole arm to ache. Claimant's pain can also be aggravated by stress, which causes his hand to sweat and swell.

Claimant testified that he occasionally drives his son to school, but is otherwise not helpful around the house. He spends his days watching television, and reads the newspaper. Claimant explained that his pain is so intense that it prevents him from doing virtually anything.

Claimant was treated throughout 1996 and 1997 by Dr. Phillips and his colleagues, and was restricted from work for the two years following his injury. After surgery, in February 1996, Claimant began having symptoms of Reflex Sympathetic Dystrophy (RSD)[3], and in the months that followed, doctors had no

[3] RSD is the term for an atypical pain syndrome, in which an injury to a nerve causes an overflow of nerve impulses. The resulting symptoms are a cold, sweaty, and painful affected area. Dr. Phillips explained that when

success treating his condition. Then, in September 1996, Dr. Phillips recommended Claimant have a psychological consult with Dr. Rynning. Dr. Rynning made no significant findings after evaluating Claimant. From October 1996 until April 1997, Dr. Phillips continued to treat Claimant's RSD, recommending physical therapy and various medications and nerve blocks. In April 1997, Dr. Phillips began to discuss the possibility of finding work for Claimant, and he evaluated prosthetic possibilities and rehabilitation. By August 1997, Claimant had gone through unsuccessful rehabilitation, and Dr. Phillips noted that the push to return Claimant to work was causing him anxiety over his health which was exacerbating the RSD symptoms (CX 4, p.35). In September 1997, Dr. Phillips noted that Claimant had reached maximum medical improvement for his hand, but had become highly anxious and upset regarding his ability to return to work.

In September 1997 Employer informed Claimant of a position in their facility as a "small tool repairman", which would encompass the position of gate guard (EX 6).[4] However, when he arrived at the work site, Claimant discovered that he had been assigned to work which required both of his hands. He was unable to perform the light duty assignment, and he returned to Dr. Phillips, who reiterated his restrictions, and recommended another psychological consult. Following Claimant's attempt to return to work his mental health worsened, and Dr. Rynning began treating him for a major depression, which Claimant testified continues to the present.

Claimant's wife, Brenda McClure Truitt, testified at the formal hearing. She has been married to Claimant for 25 years. She testified that she does the majority of the work around the house, as well as getting her children to help with dishes and yard work. She explained that since the October 5, 1995 accident, Claimant has been difficult to get along with, specifically, that he would anger quickly and consequently, she had decided to hide his gun (TR 79). She remarked that it was difficult to get Claimant to leave the house, and even on a trip to Texas, Claimant

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RSD is active, patients will arrive with the affected extremity wrapped in a pillow, because the involved area is very sensitive (TR 104). It is a severe complication of a nerve injury, which develops between 3-4 months following the injury. RSD is related to the same chemicals that cause anxiety and stress, so anger will cause the affected area to become symptomatic, numb, and cold.

[4]Employer also sent a letter dated October 17, 1997 informing Claimant of a gate guard position which would be offered under the title "small tool repairman." (EX 6)

simply lay around. She explained that as to errands and family matters, she was responsible for most of the necessary driving.[5]

Nancy T. Favaloro, a vocational rehabilitation expert, testified at the formal hearing. Ms. Favarolo generated two reports regarding Claimant's vocational rehabilitation potential, first on September 23, 1997, and again on October 1, 2002 (EX 5). Ms. Favarolo met with Claimant, reviewed his work history, education, age, and disabilities. She also tested Claimant's reading skills and determined that they were extremely poor.

Ms. Favarolo testified that in August 1997, Employer informed her that there was a security guard position available at their facility, which she verified that Claimant was capable of performing with Dr. Lawrence Russo, an orthopedist who had evaluated Claimant, and Dr. Phillips (TR 131). In her September 1997 report, Ms. Favarolo identified jobs which took into account Claimant's functional illiteracy, ability to work only with his right hand, and sensitivity to cold weather. The jobs she identified were a sorter position at Hilton Riverside, paying $5.25/hr., a parking lot checker, which included outside work and paid $5.15/hr., and finally a production worker at a microfilming company, paying minimum wage. Because of the job offer at Employer's facility, Ms. Favarolo closed her file in regards to Claimant.

Ms. Favarolo was contacted by Employer again towards the end of August 2002. She updated information, reviewed medical records, and although much had remained static, identified jobs that she felt Mr. Truitt was capable of performing. Ms. Favarolo assumed that Claimant was not psychiatrically disabled, based on the opinions of Drs. Greve and Roniger, but rather that returning to work would be therapeutic. She considered that he was unable to perform any tasks that required more than a fourth grade reading level, because that is where he had tested, and that he was essentially a one-armed worker.

As of October 1, 2002, Ms. Favarolo identified a job in Employer's paint department through the return-to-work program, as well as four other unskilled

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[5] Mrs. Truitt also testified about her perceptions of Claimant's intellectual capabilities. She explained that in order to read his writing, one has to know what he is attempting to say. He misspells and misuses words. As to his math skills, she explained that his skills are somewhat less than their nine year old son, further opining that he had never been a big help with the children's homework, because he was not educated.

simple jobs, outside of Employer's facility, paying minimum wage, namely, a greeter at a store, a cafeteria line server, an unarmed security type position, which might require some outside monitoring, and lastly a bread packer in a bakery. All the jobs identified could be performed with one arm, and most had climate controlled environments, with no reading requirements.

Ms. Favarolo agreed that as far as she knew, the only job Claimant ever actually knew about was the gate guard position offered in September and October 1997, by Employer, which Claimant attempted but was ultimately unable to perform. As to the later identified jobs, she did not inform Claimant, but sent her report directly to Employer's attorney.

When asked to assume Claimant had the symptoms of a severe depression, as described by Dr. Rynning, including difficulty interacting with the public, maintaining attention, accepting work stress, and working independently, Ms. Favarolo agreed that it would be very difficult for Claimant to maintain employment (TR 147). Ms. Favarolo exlplained that based on the symptoms and restrictions identified by Dr. Rynning, she, as a vocational rehabilitation expert, would say that Claimant could not work (TR 151).

Edward Ryan, a licensed vocational rehabilitation counselor, testified at the formal hearing.[6] Based on a hypothetical situation presented, Mr. Ryan agreed that if an individual with the same background and academic abilities as Claimant, had a left hand he was unable to use *and guarded*, that he would be more impaired than simply an individual that had a useless left hand (TR 171). Mr. Ryan further testified that with the use of only one arm, Claimant could not compete effectively for the jobs identified by the labor market survey of September 1997, and further, based on Dr. Rynning's testimony he would be specifically incapable of being a greeter.

Claimant's Exhibit 1, is Claimant's wage statement from the year preceding the accident. It is evidence that Claimant worked the full 52 weeks preceding his

[6] I determined that Mr. Ryan was an expert in his field, however, his testimony was limited to the Dictionary of Occupational Titles (DOT) definitions of particular jobs, and whether he thought, based on all the he had heard, Claimant could perform the DOT version of the jobs identified by Ms. Favarolo.

injury from October 2, 1994 through October 1, 1995, earing total wages of $22, 384.16. Claimant received a raise in January 1995 from $10.48 to $10.85 per hour.

Medical Evidence

Dr. Stuart Phillips was Claimant's treating orthopedist. He referred Claimant to Dr. Jonathan Rynning, a psychiatrist, for a psychological consult. Dr. Rynning diagnosed a severe depression, which he associated with the October 5th accident, and prescribed a variety medications. Drs. Lawrence Russo and Terence D'Souza examined Claimant and diagnosed RSD, making various recommendations for treatment, including prosthetics and medication. Dr. Richard Roniger, a psychiatrist, examined Claimant at the request of Employer and felt that his psychiatric problem, namely depression, was not totally disabling and that he should be returned to work. Dr. Ralph Katz, an orthopedist, examined Claimant at the request of Employer, and opined that Claimant suffered from RSD, but felt that the majority of his pain was due to a neuroma, and consequently further surgery could be indicated. Dr. Kevin Greve, a psychologist, evaluated Claimant, and determined that, based on his testing, Claimant was a malingerer. Dr. Nathanael Mullener, a psychologist, evaluated Claimant and determined that his academic and intellectual abilities were extremely low, but that there were no indications of malingering.

Dr. Stuart Phillips, a board certified orthopedic surgeon, testified at the formal hearing. His medical records are Employer's Exhibit 13. He first examined Claimant on November 9, 1995. At that time, Claimant had a necrotic volar aspect of his thumb, and when x-rayed it showed that there was still paint in the thumb and osteoporosis, which suggested necrosis. Dr. Phillips was unsure of his ability to perform a toe-to-thumb transplant, and so he began to inquire into other possibilities. Claimant decided he did not want the toe-transfer, but in the meantime the wound had progressed. It soon became apparent that the thumb would separate, which it subsequently did in January 1996, and the wound began to heal on its own. On February 22, 1996, in outpatient surgery, the remainder of Claimant's thumb above the interphalangeal joint was amputated. Also in February 1996, Dr. Phillips commented that Claimant was developing some Reflex Sympathetic Dystrophy (RSD). In April 1996, Dr. Phillips recorded Claimant's RSD symptoms again, as well as remarking that it was a typical time for RSD to be diagnosed, and vowed to treat it vigorously. Claimant was injected with steroids, and prescribed Triavil.

During April 1996, Claimant and Dr. Phillips discussed the possibility of a stellate ganglion block, which would block the nerve flow to the upper extremity with novocaine. Dr. Phillips did not perform the stellate ganglion block, but he did try tricyclic and anitsympathetic medication and local blocks of the inflamed nerve. Claimant was prescribed hydrocodone[7] for pain, as well as tricyclic antidepressants[8], and a Lidoderm patch, which Dr. Phillips explained are all of the standard drugs for treatment of RSD. Dr. Phillips expressed the sentiment that Claimant was honest and hard working and he wanted all the medical help available to treat Claimant. In September 1996, in an effort to solve the "enigma" of Claimant's condition, Dr. Phillips recommended that he see Dr. Rynning for a psychological consultation.

On January 7, 1997, Dr. Phillips wrote a note which indicated that Claimant had been treated or evaluated by a host of good doctors who all came to the same conclusion: Claimant would never use the involved left hand and the condition would not improve. At that point, Dr. Rynning had concluded that Claimant was psychiatrically unremarkable, and so it was expected that Claimant could be returned to some kind of work. However, Dr. Phillips felt there was very little active function in Claimant's left hand, and instead he encouraged Claimant to get a GED, and continue with physical therapy. In March and April 1997, Claimant's symptoms were worse, and Dr. Phillips said "He is doing horrible."

In August 1997, Claimant was sent to a work-hardening program, but Dr. Phillips' prognosis was that it would not be successful. As part of the program to desensitize his hand, Claimant placed his hand in hot sand and marbles. The result was the Claimant's hand became swollen, and he returned to Dr. Phillips who informed him that he should not return to work hardening/rehabilitation. Claimant was given an injection for the pain, and Dr. Phillips remarked that the stress of the program had made the RSD worse.[9] On August 21, 1997, Dr. Phillips opined that

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[7]Hydrocodone is the generic name for numerous medications, including, Vicodin, Loriset, and Lortab. It is the most commonly prescribed narcotic pain reliever. (TR 98).

[8] At the time the antidepressants were to treat pain, not depression, based on the knowledge that the same chemicals that involve depression also react to neuritis and RSD, therefore they are treated with the same medication.

[9] In his note of August 11, 1997, Dr. Phillips remarked that he did not think Claimant's left hand could be rehabilitated, but the physical therapist had disagreed. He wrote that "Those folks are trained to try to rehab

there was not much more he could do for Claimant, but continue to treat him conservatively and refill pain medications.

On September 22, 1997, Dr. Phillips reported that Claimant was going to be returned to work, however, the anxiety over the possibility that he would be fired or accused of being lazy when individuals did not believe his pain, had caused his hand to sweat and become painful. Dr. Phillips reiterated his restrictions on cold weather and one-handedness. He commented that he felt Claimant was only suited to office work, and should be retrained. He felt that if Claimant was assured that there was a place in society for him, then he would feel better, and function better. Although he felt that Claimant had reached maximum medical improvement as to his hand, Dr. Phillips still felt that there was medical treatment to improve Claimant's psychological and rehabilitative conditions. On September 25, 1997, Dr. Phillips commented that Claimant had reported to Employer's facility, but was not able to perform the work assigned. He also noted that Claimant had not been cleared by Dr. Rynning to work, and he was not to return to work until he had been evaluated by Dr. Rynning.

On October 9, 1997, Dr. Phillips noted that Dr. Rynning would begin treating Claimant, and therefore he would discontinue the frequency of his appointments with Claimant. Dr. Phillips stated, that based on the psychological findings of Dr. Rynning, Claimant was unable to return to work. There were no significant physiological changes over the following two years, but in June 1999 and many of the appointments that followed, Dr. Phillips remarked that Claimant was notably anxious and depressed, becoming "teary" while discussing his symptoms with him.

Dr. Phillips opined that Claimant's permanent impairment was inclusive of the arm and shoulder, due to the RSD. In addressing Dr. Russo's calculation of the loss of a thumb, Dr. Phillips noted that although simply losing a thumb is only a 40% impairment of the hand, Claimant's RSD significantly increased both the percentage and area of the body affected by the impairment.[10] In a March 2000 note, Dr. Phillips explained why Claimant's RSD had not responded to typical

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everybody, and it is always difficult to know when it is best to quit, but my best clinical judgement is the Arthur isn't going to be "re-habed", that he is a good, honest fellow, that he is not lying, and I don't think it's a good idea for Avondale to keep bothering him because the more anxiety over his health state, the worse his hand gets." (CX 4, p.35)

[10] Letter to Mr. Vincent from Dr. Phillips dated December 29, 1999. (EX 13)

treatments by observing that Claimant's condition was a toxic neuritis, which was not classical RSD.

After his most recent evaluation of Claimant, on September 3, 2002, Dr. Phillips felt that Claimant continued to suffer from RSD, and there existed no cure for it. Because the stellate ganglion block had been unsuccessful in Claimant, Dr. Phillips did not see the efficacy of a surgical block or an infusion pump (TR 109).[11] A further amputation would only serve to exacerbate the nerve damage. In response to Dr. Katz's suggestion of further surgery, Dr. Phillips responded that he had already removed a neuroma[12], and it grew back and worsened. Dr. Phillips agreed that Claimant's depression would make it more difficult for him to handle the pain from RSD (TR 108).

Dr. Phillips felt that Claimant could not return to sand-blasting because of his pain disorder, but deferred to Dr. Rynning regarding Claimant's mental health and related capabilities. He did emphasize Claimant's ability to use his right hand, but noted that Claimant should not work outside for at least four months of the year (TR 113), commenting that Claimant's work environment should not be vigorous or involve a lot of people and machinery, because it would increase the risk of bumping his left hand. Dr. Phillips did not think Claimant was a malingerer, explaining that Claimant only complained of pain when there were accompanying symptoms. Dr. Phillips explained that Claimant's specific condition was in the 20% worst RSD cases he has ever treated.

Dr. Lawrence Russo, an orthopedic doctor, saw Claimant on April 23, 1996, for an evaluation, and his records are Employer's Exhibit 9 . His impression was that Claimant appeared to have RSD, and could possibly benefit from a sympathetic nerve block. He anticipated seeing Claimant three months following the nerve block. Dr. Russo saw Claimant again on August 19, 1996, at which time he had reviewed the report of Dr. Rand Metoyer, who had performed the stellate ganglion block, on July 11, 1996. Although he noted Claimant had no dramatic response to the sympathetic blocks, he remained unconvinced that Claimant did not have RSD.

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[11] Claimant underwent a stellate ganglion block on July 11, 1997 with Dr. Metoyer, a board certified anesthesiologist with a specialty in pain management (CX 5).

[12] A neuroma occurs when a nerve is severed and there is a collection of scar tissue around the end of the nerve (TR 110)

On January 22, 1997, Dr. Russo examined Claimant's thumb, and remarked that the sensitivity of Claimant's thumb would make it extremely difficult to get "this patient to perform any type of work with his left hand." He suggested the possible utility of an orthotic device that could shield the thumb, and allow Claimant to shuffle papers or hold light devices, making returning to work using both hands a possibility. Then, in a letter dated August 26, 1997, Dr. Russo stated that Claimant's orthopedic injury had reached maximum medical improvement, with a 40% permanent impairment rating to the hand. Dr. Russo felt that Claimant was capable of performing the security gate guard position offered by Employer.[13]

Claimant's Exhibit 7 is the records of Dr. Terence D'Souza, a neurologist, who saw Claimant on October 17, 1996. He diagnosed RSD, and opined that Claimant was significantly disabled because any movement to the left hand or arm produced severe excruciating pain. He noted that Claimant had been tried on a variety of medications, including a sympathetic nerve block, with no real success. Dr. D'Souza felt that Claimant could no longer perform manual labor, because it would only serve to exacerbate the condition, recommending that Claimant try Neurotin.

Dr. Jonathan Rynning, a psychiatrist, testified at the formal hearing. He first saw Claimant on October 9, 1996 (TR 37), and his records are part of Claimant's Exhibit 8 and Employer's Exhibit 14. After an initial exam in 1996, Dr. Rynning did not feel that Claimant had any psychiatric problems, rather that he was suffering from an ambivalence or indifference about returning to work. He found no physical explanation for the painful thumb, but commented that conversion disorders usually do not take the form of pain, but instead paralysis or lack of sensation.

Dr. Rynning testified that he did not see Claimant again until October 6, 1997(TR 41), and by November 5, 1997, he diagnosed Claimant as suffering from a major depression, and he agreed that the depression could be linked to a constant pain syndrome (TR 42). He did not feel that the depression was brought about by doctors suggesting Claimant could return to work (TR 58). Dr. Rynning explained

[13] Ms. Favarolo corresponded with Moon Orthopedics regarding the prosthetic device, which ultimately proved impractical due to Claimant's sensitivity. Instead, a prosthetic specialist recommended a sling which would rest the arm at a 40 degree angle on his chest, relaxing the hand and arm (EX 5).

that it is not uncommon for a depressive state to come over time (TR 56), although is was somewhat unusual for it to persist as long as six years.

Dr. Rynning has seen Claimant approximately every two months since 1997, for about 15-20 minute sessions, which he estimated to be approximately 50 visits.[14] Dr. Rynning explained that Claimant has been consistently depressed, and has had no periods in which he has approached recovery.[15] Dr. Rynning stated that he had no indication over the past six years that Claimant was malingering, never having ascertained a false feeling from Claimant. However, he clarified his opinion by saying that in any case of financial gain, there is the potential for exaggeration of symptoms, but that he did not feel that an *exaggeration* of symptoms meant that there was no illness at all.

Dr. Rynning explained that Claimant had manifested many symptoms of depression, including frequent crying spells, feelings of worthlessness and hopelessness, recording several times that Claimant was stressed out, confused, and worried all the time, as well as having suicidal thoughts and ideation. Dr. Rynning noted in May 1998, that Claimant was exhibiting psychomotor agitation and having crying spells once or twice a week, and he opined that he did not think Claimant was capable of working and performing an adequate job. In his September 13, 1999 note, Dr. Rynning opined that Claimant might need to be hospitalized, citing the severity of the depression and risk of suicide. Claimant continued to have a low energy level, and seemingly the entire roster of depressive symptoms (TR 44). Dr. Rynning was unaware that Claimant's physicians had recommended that he return to work or that he had in fact tried to return to work. Claimant has been prescribed seven to eight different anti-depressants, including; Neurotin, Elavil, Effexor, Welbutrin, and currently Pamelor or nortriptyline. Dr. Rynning agreed that the IQ scores reflected in the tests performed by Claimant were, in his opinion, accurate.[16]

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[14] Dr. Rynning agreed that Claimant had missed appointments, and had times when he had difficulties taking medications correctly.

[15] Dr. Rynning explained that Claimant has improved 35%, assuming that 100% is either full recovery or severe depression, meaning that he continues to be 65% depressed.

[16] Drs. Greve and Mueller had performed a Wechsler intelligence test that resulted in nearly identical scores, but they disagreed as to the validity of the scores.

Dr. Rynning testified that Claimant's depression would make it very difficult for him to deal with the public, explaining that Claimant is very emotionally labile, even with somebody with whom he is comfortable. Dr. Rynning opined that having to interact with the public would be very stressful, to the point that Claimant would become nonfunctional. He further clarified Claimant's emotional instability by saying that when the pain becomes intractable, Claimant will become either irritable or tearful, making it difficult to maintain control over his emotions, and having unpredictable social relations.

Dr. Rynning explained that Claimant is continually distracted by the amount of pain he is experiencing, making it very difficult to maintain attention and concentration. Consequently, based on his level of intellectual capabilities and the severe depression, Claimant would have difficulty following instructions in a complex job, or finding any gainful employment. However, even with his problem with repetitive skills and maintaining attention, Dr. Rynning felt that perhaps Claimant could work as a security guard for two hours a day, checking badges in a climate controlled environment, without having to confront non-badge wearing individuals (TR 62). Dr. Rynning remarked that Claimant would have very little ability to function independently in a work environment (TR 48). He opined that although Claimant could show up for a work position, his disability would make it unlikely that he could perform his duties effectively, or be able to stay and work through the pain (TR 52). Dr. Rynning agreed that based on the totality of his knowledge of Claimant's case, he relates the current state of depression, which has caused an inability to work, to the accident on October 5, 1995.[17]

Dr. Richard Roniger, a psychiatrist, saw Claimant on December 12, 1997, for an independent medical examination. His records are Employer's Exhibit 8, and his deposition is Employer's Exhibit 19. After an initial exam, Dr. Roniger reported that Claimant presented a clinically depressed person, however, he did not understand Claimant's reports of auditory hallucinations, and did not think Claimant was psychotic. In his deposition, at page 17, Dr. Roniger did agree that people who have chronic pain may also have depressive symptoms. He felt that returning to gainful employment would be therapeutic for Claimant, concluding that he was not disabled from a psychiatric point of view, but opined instead that the pain syndrome

[17] In making this decision he had taken into consideration other problems plaguing defendant, including his wife's disability from arthritis and diabetes and other problems.

was the appropriate diagnosis. He recommended tapering Claimant off of Vicodin, while increasing the dosage of nortriptyline, which he felt was subtheraputic at 25 milligrams.

Dr. Roniger saw Claimant again on June 4, 1999. Dr. Roniger stated that his opinion remained unchanged. He reiterated his recommendation that Claimant be tapered off of Vicodin, and that the narcotic analgesic medication be eliminated altogether, because it could be the source of the depressive symptoms. He opined that Claimant would benefit from gainful employment and a more structured way of life. Dr. Roniger saw Claimant again on September 9, 2002, with no new insights or notations.

Dr. Ralph Katz, whose records are Employer's Exhibit 10 and deposition is Employer's Exhibit 20, is a board certified orthopedic surgeon, who performed independent medical examinations on January 26, 2000 and September 18, 2002. He noted that Claimant guarded his left hand, and had a lot of subjective complaints of pain. Following a three phase bone scan, he found that Claimant had a major causalgia and an 93% impairment to his hand.[18] At the second exam, Dr. Katz recommended that Claimant undergo a Functional Capacity Examination (FCE), in order to determine his capabilities, or the potential for retraining. However, Dr. Katz surmised that Claimant probably could not even perform the FCE because of the amount of pain and guarding he was having in the left extremity (EX 20, p. 14).

In the two year interim period between his two evaluations, Dr. Katz opined that Claimant had some signs of improvement. Specifically, that he was able to touch the stump of his thumb on the second visit. Dr. Katz discussed the possibility of a full stump amputation, to address the neuroma, which he felt was the major source of Claimant's pain, not RSD. Claimant reluctantly agreed that if surgery was the only way to reduce the pain, he would be willing to undergo the surgery (TR 29). Dr. Katz explained that because Claimant's pain had not responded to treatments for RSD, then it was probably not the source of the pain. Furthermore,

[18] Which is comparable to an 84% impairment to the upper extremity, or a 50% impairment to the body as a whole.

on the second visit, Claimant did not have as many symptoms of RSD.[19] Dr. Katz did not find any indications of malingering.

Dr. Kevin Greve is a clinical neuropsychologist, specializing in behavioral medicine, who divides his time between academia and private practice. He saw Claimant on September 18 and 19, 2002, at the request of Employer. Dr. Greve's records are Employer's Exhibit 17, and his deposition is Employer's Exhibit 21. Dr. Greve interviewed Claimant and reviewed all the medical records, and administered several tests to determine Claimant's academic ability and intelligence. He noted that Claimant scored worse than somebody with a severe brain injury, and remarked that although Claimant guarded his hand, he was able to use the keyboard.[20] Consequently, Dr. Greve diagnosed Claimant as a malingerer, as indicated by his willingness to fabricate deficits on the evaluation. He diagnosed a pain disorder with psychological factors and a general medical condition, but one that was not disabling. Dr. Greve remarked that Claimant might be experiencing some sort of pain, based on the complicated healing of a real injury, but the late appearance of symptoms of psychological distress which coincided with returning to work, prompted Dr. Greve to diagnose "malingering" .

Although Dr. Greve did not actually perform the approximately 9 hours of diagnostic intelligence testing, he relied heavily on the results.[21] Dr. Greve opined that there was a 92% probability that Claimant gave an intentionally poor performance. Dr. Greve's deposition focused on the different tests that were given, their purpose, their effectiveness, and interpretations of the data. He noted that in response to questions, Claimant answered that the way he deals with his problems is to pray and hope he gets better, indicating that he had no active coping mechanisms.

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[19]Dr. Phillips explained that due to the intermittent symptoms of RSD, it is a commonly clinically undiagnosed problem. If a doctor were to only see a patient on a "good" day, then the area affected would appear dry and warm and have none of the RSD symptoms (TR 105). Claimant's second appointment with Dr. Katz was in September, a "good" month for RSD patients, as oppose to January, which is typically cold, and therefore a "bad" month.

[20]When asked about this incident, Claimant explained that he was unable to use his left hand and could not have typed on a keyboard (TR 75), and Dr. Greve agreed that he did not personally witness Claimant using his hand, but rather his psychometrist recorded that he had (EX 21, p. 65).

[21] Dr. Greve employs a trained psychometrist, Elizabeth Uribe, to perform the tests (EX 21, p. 8).

Dr. Nathanael Mullener, a clinical psychologist, saw Claimant on October 1, 2002, and his records are Claimant's Exhibit 11. In a letter addressed to Claimant's attorney, he discussed the findings of his evaluation, and attested that Claimant was visibly anxious and sad, crying and becoming agitated when told of further intelligence testing. However, Dr. Mullener remarked that Claimant seemed concerned in regards to failure and low performance on the test. Dr. Mullener administered the WRAT 3 and the WAIS 3, and found that Claimant scored as mildly mentally retarded. Due to the poor scores, he administered a malingering screening test, which was negative for indications of malingering. Dr. Mullener concluded that Claimant had low intellectual capabilities and appeared to be suffering from a significant chronic depression, with fitful sleep, decreased energy, feelings of worthlessness, problems concentrating, and suicidal thoughts.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc.*, 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1994).

Causation

Section 20 (a) of the Act provides the claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98

(1984). It has been consistently held that the Act must be construed liberally in conformance with its purpose, and in a way that avoids harsh and incongruous results. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury occurred on October 5, 1995 during the course and scope of Claimant's employment. I find that a harm, and the existence of working conditions which could have caused that harm, have been shown to exist, and I accept the parties stipulation. Claimant clearly injured his hand while using a paint gun. However, the relationship of Claimant's depression to the accident remains at issue.

As explained in *Ehlhardt v. Department of the Army/ Non-appropriated Funds*, 28 BRBS 527(1994), it is well settled that a psychological impairment which is work related, is compensable under the Act. *Director, OWCP v. Potomac Electric Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979): *Turner v. The Chesapeake & Potomac Telephone Co.*, 16 BRBS 225 (1984) (Ramsey, C. J., dissenting on other grounds). The Section 20(a) presumption is applicable in psychological injury cases, but before, the Section 20(a) presumption applies, Claimant must prove not only that he has a psychological impairment, but that an accident occurred or working conditions existed which could have caused the impairment. *Adams v. General Dynamics Corp.*, 17 BRBS 258 (1985).

Dr. Rynning has been Claimant's treating psychiatrist for six years. He diagnosed Claimant's depression within two years of the accident and has continued to treat Claimant since then. Dr. Rynning drew a clear causal link between the accident and Claimant's depression, and I find his opinion to be persuasive. Claimant clearly has RSD as a result of the accident, and that disabling chronic pain, according to Dr. Rynning, has resulted in a severe depression. Even those doctors who did not find Claimant's psychiatric condition to be disabling, agreed that

chronic pain can cause depression. Dr. Phillips, noted a significant downward turn in Claimant's mental health, remarking in his notes that Claimant was visibly anxious and often wept. I find that Claimant's feelings of worthlessness and hopelessness as recorded by Dr. Rynning, when combined with Dr. Phillips explanation of the diagnosis of incurable RSD, provide sufficient evidence that Claimant suffers from symptoms of depression, and according to Dr. Rynning that depression is related to the work place accident on October 5, 1995. Claimant has invoked the §20(a) presumption of causation for his psychiatric injury.

Employer presented Dr. Greve's testing and Dr. Roniger's evaluation as evidence that Claimant is a malingerer, in order to rebut the presumption of causation. However, I find that Dr. Greve's determination that Claimant exaggerated his intellectual deficits, did not address Claimant's symptoms of depression nor the cause of Claimant's depression, and therefore Dr. Greve's opinion does not bear directly on the issue of causation. And although Dr. Roniger did not feel Claimant's depression was disabling, he did not hesitate to note that Claimant presented as a depressed individual. Therefore, Employer's evidence to rebut the presumption is insubstantial and, consequently, insufficient.[22]

Therefore, I find that Claimant presented sufficient evidence to invoke the presumption that his depression is causally related to the October 5, 1995 accident, and it was not rebutted by Employer by substantial evidence. Claimant suffers from a psychological injury caused by the October 5, 1995 accident.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

[22] However, even assuming, *arguendo*, that these opinions were substantial enough to rebut the presumption, in weighing the evidence Dr. Greve's findings are tempered by Dr. Mullener's. Dr. Rynning's opinion of causation would be determinative, and the weight of the evidence indicates that Claimant's depression and the October 5, 1995 accident are causally related.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

I accept the parties stipulation that Claimant's hand or arm injury reached MMI on September 25, 1997 (TR 190). Any compensation awarded after that date will be permanent in nature. As to Claimant's psychiatric condition, Dr. Rynning testified that Claimant continues to undergo treatment; however, he did not feel the prognosis was hopeful (TR 64). Even so, Dr. Rynning continued in 2001 to adjust both the type of anti-depressant as well as the dosage administered, in an effort to find the appropriate chemical balance for Claimant. Since the Fifth Circuit has recognized that an employee is permanently disabled "when his condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir.1968), *cert. denied*, 394 U.S. 976, 89 S.Ct. 1471, 22 L.Ed.2d 755 (1969), there is some question as to whether Claimant's psychological injury has reached maximum medical improvement.

The Board held in *Louisiana Insurance Guaranty Assoc. v. Abbott*, 27 BRBS 192 *aff'd* 40 F.3d 122, (5th Cir. 1994) that a condition becomes permanent when the employee is no longer undergoing treatment with a view towards improving his condition. *See also Brown v. Lykes Bros. Steamship Co.*, 6 BRBS 244, 247 (1977) noting that even where subsequent treatment does not improve a claimant's condition, the claimant may not reach maximum medical improvement until medical opinion establishes that the treatment was not successful and further treatment would not improve the claimant's condition. In other words, if a doctor determines that further treatment should be undertaken, then a possibility of success presumably exists and one cannot say that a patient has reached the point at which no further medical improvement is possible until such treatment has been completed--even if,

in retrospect, it turns out to have been ineffective. *Abbott.* Therefore, since Dr. Rynning continues to adjust Claimant's medication, either increasing the dosage or adjusting the type of medication, Claimant continues to undergo treatment for his depression, and although it is unusual for a disabling depression to have lasted 6 years, the hope must still persist that with the correct dosage of medication Claimant could stabilize and even improve. Therefore, Claimant's depression has not reached maximum medical improvement, and the disability remains temporary in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

If an injury occurs to a body part specified in the statutory schedule, then the injured employee is limited to the permanent partial disability schedule of payment contained in Section 908 (c)(1) through (20). The rule that the scheduled benefits are exclusive in cases where the scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability was thoroughly discussed by the Supreme Court in *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 101 S. Ct. 509, 66 L. Ed. 446 (1980).

I agree with the parties' stipulation that Claimant has shown he has a 93% impairment, as opined by Dr. Katz. However, the parties disagree as to whether that impairment rating applies to the hand or to the arm.[23]

In this case, the majority of doctors who evaluated Claimant agreed that he suffers from RSD, which causes an influx of pain, and results in Claimant guarding his left hand. As Dr. Phillips explained, Claimant's tendency to guard against the slightest sensation makes it unreasonable to expect him to use his hand. Dr. Phillips urged that Claimant's amputated thumb has really resulted in the 100% loss of the use of his *hand*, but admitted that it could be used for carrying a newspaper (TR 102), and so he agreed to a lesser impairment rating. Dr. Katz determined that the impairment was to the hand (EX 20, p. 24), as did Dr. Russo (EX 9). Therefore, I find that Claimant sustained a 93% permanent impairment of his left hand, which is compensable by 226.92 weeks of benefits.[24]

Although, Claimant has an injury to his hand which is compensable under the schedule as of the date of maximum medical improvement September 25, 1997, there is the additional unscheduled psychological injury. Dr. Phillips noted that unless Claimant's psychological problems could be resolved Claimant would be unable to work, and Dr. Phillips had restricted Claimant from work on September 25, 1997, until a psychological evaluation could be completed. Dr. Rynning diagnosed Claimant with a major depression in October 1997. Dr. Rynning testified that Claimant's condition continues to be so severe that he would be unable to consistently report for a job, or interact successfully enough to maintain employment. Dr. Rynning has seen Claimant every two months for the past six years, as his treating psychiatrist, which places him in the best position to evaluate Claimant's mental health. Although Dr. Roniger felt Claimant would benefit from returning to work, he evaluated Claimant on only three occasions, and therefore his understanding of, and familiarity with, Claimant is more limited. I accept Dr. Phillips' and Dr. Rynning's opinions, that Claimant's anxiety and depression are not

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[23] Hand injuries *may* be considered as scheduled permanent partial disabilities to the arm under Section 8(c)(1) rather than as a disability to the hand under Section 8(c)(3). *See Scott v. Army Central Insurance Fund* 30 BRBS 412(1996, ALJ) *Sankey v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 886 (1978); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978).

[24] 100% loss of an hand is compensable by 244 weeks of benefits, therefore, 93% loss of use would be equal to 226.92 weeks of benefits. § 8(c)(3)

a result of trying to avoid work, as suggested by Drs. Roniger and Greve, but rather a response to the fear of overwhelming pain and potential failure, and consequently are totally disabling.

Mr. Favarolo's labor market survey identified jobs for Claimant's physical abilities, but are only suitable if Claimant's depression were either fictitious or could be cured by work. Based on Dr. Rynning's observations, Claimant would not be successful at the myriad of menial jobs that Ms. Favarolo had identified. Ms. Favarolo agreed that if the depression, as described by Dr. Rynning, were in fact true, then Claimant would be unemployable. Therefore, I find that because of the severity of Claimant's depression, his poor academic background, and his limited physical abilities, he is presently unemployable, and therefore there is no suitable alternative employment, and he remains temporarily totally disabled.[25]

Since Claimant is owed both scheduled and unscheduled disability compensation, the problem exists of determining in what *manner* the compensation should be paid. Claimant is owed temporary total disability for his depression and permanent partial disability for the 93% impairment to his hand. Based on my findings, there was no time in the treatment of Claimant's two injuries where he was successfully able to return to any suitable alternative employment. Therefore, Claimant has been temporarily totally disabled since his accident to the present. He was temporarily totally disabled from his hand injury until September 25, 1997, at which time he was restricted from work pending a psychological consultation. Dr. Rynning has never released Claimant to work.

Claimant argues that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant is not limited to one award for the combined effects of his injury, but may receive a separate award. *Bass v. Broadway Maintenance* 28 BRBS 11 (1994). Claimant agreed, however, that the awards should not be concurrently granted, but insisted that the scheduled disability remain as a credit, to be used later to supplement compensation if the total disability award is ever reduced.[26]

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[25]As discussed at pages 19 -20 of this opinion, Claimant's psychiatric problems continue to receive the benefit of medical treatment, and consequently have not reached maximum medical improvement

[26] The amount of compensation can not exceed 66.6% of the average weekly wage. *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997). Therefore, the only way the scheduled benefits would be paid is if the

Employer agrees that under the mandate of *Stevens v. Umpqua River Navigation and Wausau insurance Company*, 2001 WL 876236 (DOL Ben Rev. Bd.), Claimant can not receive both the scheduled award and the temporary total disability award concurrently. However, Employer maintains that the awards must be given consecutively, with unscheduled benefits beginning after compensation for the scheduled injury is exhausted. Employer argues that any loss in wage earning potential caused by the scheduled injury must be factored out before considering the loss of wage earning potential caused by the depression. *Smith v. Crowley American Transport*, 1997 WL 128979 (ALJ 1997).

If I were to adopt the Employer's position, that the schedule benefits be exhausted before the temporary total benefits begin, then Claimant would be deprived of his entitlement to the temporary benefits for his depression which were accruing during the same time period as his compensation for his scheduled injury was being paid. In other words, it would ignore the depression, and the accompanying benefits, until the scheduled injury was paid; an argument that was rejected by the Fourth Circuit in *ITO Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139 (CRT) (4th Cir 1999), and again by the BRBS in *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

Under *Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT) (9th Cir 1995) administrative law judges are instructed to make "whatever adjustments" are necessary to prevent overpayment. *Id* at 422. The only way to insure that Claimant is fully compensated for both the 93% permanent impairment to his hand as well as the fully disabling effects of his severe depression, is to pay the unscheduled benefits until Claimant has either exhausted that remedy or it is modified, and then pay the scheduled benefits in an amount equal to the difference between the maximum allowable and Claimant's weekly unscheduled benefits. In other words, until such time as the unscheduled benefits are reduced or discontinued, the scheduled award remains as a credit. This way, Employer is not expected to pay more than the maximum allowable under the Act, but Claimant retains the right to be fully compensated for the resulting impairment to his hand, as well as the disabling depression that resulted from the accident.

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unscheduled benefits are less than for a total disability.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 week of work was "substantially the whole year", where the work was characterized as "full time", "steady" and "regular") . The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a "catch-all" to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under the Act is determined by considering his previous earnings in employment in which he was working at time of injury, reasonable value of services of other employees in same or most similar employment, or the other employment of the employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997).

In this instance, Claimant's attorney urges two alternative methods for calculating the average weekly wage. First, he multiplied Claimant's hourly wage at the time of the accident by 40 hours per week to arrive at an average weekly wage of $434.00. Alternatively, he suggested using 10(c) so that Claimant's raise could be taken into account retroactively, and added $136.95 (608.4 hrs x 37¢ [27]) to Claimant's gross earnings ($22,384.66) then divided by 52, for an average weekly wage of $433.10. Employer, on the other hand, stated that the correct average weekly wage was $416.62, however, that contention was neither supported with argument nor calculation.

Mr. Truitt was employed for 52 weeks with Employer prior to his injury, which was permanent and full time and therefore to be considered "substantially the whole of the year." However, the exhibits fail to report the number of days Claimant worked each week, which is an essential element under 10(a). *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1 (9th Cir. 1999). Therefore, I will use 10(c), to calculate the average weekly wage. Claimant's gross earnings divided by 52 is equal to $430.47, which is a fair approximation of Claimant's average weekly wage, taking into account those weeks he worked at the higher wage, as well as the majority of time he worked at his lower wage. Therefore, I find that using 10(c), Claimant's average weekly wage is $430.47.

[27]Interestingly, the 37¢ raise, when multiplied by 608.4 hours (the hours worked at the lower wage) is actually $225.11.

Section 14 (e) penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation on October 6, 1995, 1 day after injury. Therefore, as Employer paid compensation within 14 days of learning of injury, no § 14 (e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer shall pay to Claimant permanent partial disability compensation in accordance with §8(c)(3) of the Act for a 93% impairment, based on an average weekly wage of $430.47 for 226.92 weeks; provided, however, this scheduled award shall not commence until such time as Claimant's unscheduled award is reduced or discontinued so that the amount of Claimant's weekly compensation never exceeds 66.6% of his average weekly wage;

(2) Employer shall pay to Claimant compensation for temporary total disability benefits from October 6, 1995 and continuing based on an average weekly wage of $430.47.

(3) Employer shall pay or reimburse Claimant for all reasonable and necessary medical expenses resulting from Claimant's injuries of October 5, 1995;

(4) Employer shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a

copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:eam